Industrial Contractors Skanska, Inc. *and* Michael Feist.

Laborers International Union of North America, Local Union No. 561 *and* Michael Feist. Cases 25–CA–130127 and 25–CB–130081

August 20, 2015

DECISION AND ORDER

BY MEMBERS HIROZAWA, JOHNSON, AND MCFERRAN

On February 20, 2015, Administrative Law Judge Arthur J. Amchan issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs. The Respondent Union (Union) filed answering briefs opposing the General Counsel's and the Charging Party's exceptions, respectively. The Respondent Employer (Employer) filed answering briefs to the General Counsel's and the Charging Party's exceptions, respectively. The General Counsel filed a reply brief to the Union's and the Employer's answering briefs. The Charging Party also filed reply briefs to the Union's and the Employer's answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge dismissed the complaint allegations that the Union violated Section 8(b)(1)(A) and 8(b)(2) of the Act by failing to provide the Charging Party, Michael Feist, with adequate notice of his dues delinquency before informing the Employer that he was no longer a member in good standing and thus ineligible for hire, and that the Employer violated Section 8(a)(3) and (1) by refusing to employ Feist pursuant to the Union's communication. The judge failed to address the additional complaint allegation that the Employer independently violated Section 8(a)(1) by informing Feist that it was refusing to employ him because of the Union's communication. For the reasons set forth below, we reverse the judge and find each of these alleged violations.[1]

[1] The General Counsel filed bare exceptions regarding the judge's failure to find that the Employer violated Sec. 8(a)(3) and (1) by rescinding a job offer to Feist based on the Union's communication. The General Counsel presented no argument in support of this exception. Accordingly, we find, pursuant to Sec. 102.46(b)(2) of the Board's Rules and Regulations, that this exception should be disregarded.

I. FACTS

The Employer is a large construction contractor in Evansville, Indiana. The Union represents approximately 1400 laborers in Kentucky and Indiana. The Employer and the Union were parties to a collective-bargaining agreement effective March 2012 to March 2015. The collective-bargaining agreement contained a union-security provision.

Members are required to pay $25 per month as monthly dues and 5 percent of their pay as working dues. If a member falls 2 months and 1 day behind in paying his monthly dues, the Union automatically suspends the member. To be reinstated, the member is required to pay the Union $56 for each month the member was behind on dues plus $75 to cover the next 3 months of dues.

Michael Feist has been a member of the Union since 1997, and he has worked regularly for the Employer since 1998. Feist was suspended for failure to pay dues on four previous occasions. On each of these occasions, the Union provided Feist with verbal notice of his suspension. Although Feist claimed that the Union's records were incorrect with regard to three of the four suspensions, he ultimately paid to reinstate his membership each time.

Feist did not pay his monthly dues in February and March 2014, and the Union suspended his membership in April 2014.[2] The Union did not provide Feist with any notice before suspending him because it believed that it did not have his current address. On one prior occasion, the Union's receptionist/secretary, Diane McCormick, asked Feist for his address. Feist stated that he did not need to provide it because the union pension fund already had this information.

On April 8, Feist went to the union hall to pay his April dues so that he could attend a membership meeting that night. At that time, McCormick informed Feist that his membership had been suspended and that she could not accept his dues payment until he paid all outstanding dues and the reinstatement fee. Feist then spoke with the Union's business manager and president, Barry Russell, telling him that he had paid his dues. After Russell asked Feist to show him a receipt, Feist left the union hall and returned with a receipt for March. That receipt, however, was for another member's March payment. Ultimately, Feist left without paying any dues or the reinstatement fee.

Later that afternoon, the Union sent the following fax to the Employer: "Please be advised that Mike Feist will

[2] All dates are in 2014 unless otherwise stated.

not be eligible for work or recall for your firm due to failure to maintain membership in this Union. We will advise you when this member has reinstated their membership with this Union." Thereafter, the Employer's dispatcher, Susie Titzer, called Feist and informed him that the Employer was changing his employment status from "available" to "suspended." The Employer had laid Feist off in March, but he had been on a list of available employees who would be recalled if the Employer needed his services. Feist told Titzer that he was aware of his suspension and that he was seeking legal counsel. Feist also stated that there was a dispute involving his dues, and he claimed that he had paid them. Titzer did not contact the Union before changing Feist's employment status.

Titzer and Feist spoke again on two occasions. On May 28, Titzer called Feist to ask about his membership status. Feist told her that it remained unchanged and that he had chosen not to reinstate his membership. Titzer informed him that he could not work for the Employer unless he was a union member in good standing. Nonetheless, Titzer offered Feist a job in June, but withdrew the offer the next day.

II. ANALYSIS

A. THE RESPONDENT UNION

A union violates Section 8(b)(1)(A) and 8(b)(2) if it causes or attempts to cause an employer to discharge an employee for the employee's failure to pay dues without first providing the employee with proper notice. Unions have a fiduciary duty to deal fairly with employees whom they seek to terminate for failure to pay dues. See *H.C. Macaulay Foundry Co.*, 223 NLRB 815, 818 (1976), enfd. 553 F.2d 1198 (9th Cir. 1977); *Philadelphia Sheraton Corp.*, 136 NLRB 888 (1962), enfd. sub nom. *NLRB v. Hotel, Motel & Club Employees Union, Local 568*, 320 F.2d 254 (3d Cir. 1963). The Board has explained that, at a minimum, this fiduciary duty requires that the union

> give the employee "reasonable notice of the delinquency, including a statement of the precise amount and months for which dues [are] owed, as well as an explanation of the method used in computing such amount." In addition, the union must specify when such payments are to be made and make it clear to the employee that discharge will result from failure to pay. This fiduciary responsibility to advise an employee regarding his dues obligation requires "positive action," without regard to any concurrent obligation on the employer to provide notice.

Western Publishing Co., 263 NLRB 1110, 1111–1112 (1982) (internal citations omitted). A union's fiduciary duty requires that an employee be given a reasonable opportunity to make payment after receipt of the notification of delinquency. *Coopers NIU (Blue Green)*, 299 NLRB 720, 724 (1990), citing *United Metaltronics Local 955 (Pharmaseal Laboratories),* 254 NLRB 601 (1981). Moreover, the union's fiduciary duty "is not satisfied by the fact that the employee may have acquired independent knowledge of the existence of the union-security clause and his obligations thereunder." *Teamsters Local 630 (Ralph's Grocery Co.)*, 209 NLRB 117, 124 (1974).

Because the above protections were never "intended to be so rigidly applied as to permit a recalcitrant employee to profit from his own dereliction in complying with his obligations," the Board will excuse a union's failure to fully comply with the notice requirements if the union proves that the employee made a "conscious decision" to "willfully and deliberately . . . evade his union-security obligations." *Ralph's Grocery*, 209 NLRB at 124, 125; accord *Conductron Corp.*, 183 NLRB 419, 426 (1970). It is clear, however, that "negligence or inattention on the part of the employee will not relieve the union of its fiduciary obligation." *Grassetto USA Construction*, 313 NLRB 674, 677 (1994).

Applying these principles, the judge found that the Union's actions did not violate Section 8(b)(1)(A) and 8(b)(2). The judge found that Feist was aware of the dues and fees that he needed to pay to reinstate his membership because of his past suspensions and, further, that although the Union may not have advised Feist of the employment consequences of his suspended status, the Employer did. As a result, the judge found that Feist made a "conscious decision" not to make the payments necessary to reinstate his membership. Additionally, the judge found that the record did not indicate that Feist had a "good-faith belief" that he had paid his dues in February and March. Rather, the judge found that Feist was "well-aware" that he had not paid his dues.

Contrary to the judge, we find that the Union's actions violated the Act. To begin, we find that the Union failed to provide Feist with adequate notice of his dues delinquency before informing the Employer that he was no longer eligible to work. The Union did not provide Feist with the precise amount and months for which dues were owed, did not explain the method for computing that amount, did not set a date by which payments were to be made, and did not make clear that discharge would result from his failure to pay dues. See *Western Publishing*, 263 NLRB at 1111–1112. Nor was the Union relieved of its fiduciary duty because Feist may have had actual knowledge of his dues obligations or because the *Em-*

ployer informed Feist of the consequences of his suspension. See id. at 1112; *Ralph's Grocery*, 209 NLRB at 124. Additionally, the Union was not relieved of its duty because it believed that it did not have Feist's address or because Feist failed to provide it. See *Valley Cabinet & Mfg. Co.*, 253 NLRB 98, 98, 108–109 (1980) (violation where Union failed to provide notice even though employee had "failed repeatedly to fulfill her obligation to notify the [u]nion of changes in her address"), enfd. 691 F.2d 509 (9th Cir. 1982); *Machinists District 9 (Marvel-Schebler)*, 237 NLRB 1278, 1278 (1978) (holding "it is not sufficient for a union simply *to attempt* to notify employees") (emphasis in original). It is clear that Feist was not given a reasonable time to pay any delinquency; indeed, the Union sent its faxed discharge demand mere hours after informing Feist of his alleged delinquency. As the *Philadelphia Sheraton* court recognized, given the dire consequences of termination, "minimum" requirements are necessary to "inform the employee of his obligations in order that the employee may take whatever action is necessary to protect his job tenure." 320 F.2d at 258.

Next, we find that the Union did not meet its burden of proving that the exception to the rule set forth in the *Philadelphia Sheraton* line of cases applies here. Although the judge relied on cases involving this exception, he failed to explain that the exception applies only where the union establishes that the employee made a conscious decision to willfully and deliberately evade his dues obligations. Further, the judge failed to find that the Union established that Feist fit this description.

In our view, the Union failed to demonstrate that Feist made a "conscious decision" to deliberately and willfully evade his dues obligations when he failed to pay his dues in February and March. Feist had been a dues-paying Union member since 1997. On April 8, the day Feist learned that he had been suspended, he had gone to the Union hall to pay his dues for that month, not to evade paying them. The Union, however, refused to accept his payment because of his arrearages; there is no evidence that Feist had any reason to think, prior to the refusal, that his proffer of April dues would not be accepted. Notably, Feist returned later that same day in a further effort to gain reinstatement. Although it is true that Feist had a history of falling behind on his dues, he also had a history of paying to reinstate his membership each time. Unlike the cases cited by the judge, there is nothing in this record that establishes that Feist's failures up to the moment of his suspension were due to anything other than inattention or negligence, and neither relieves a union of its fiduciary duty. See *Grassetto*, 313 NLRB at 677. Moreover, after the Union informed Feist of his suspension, he informed both the Union and the Employer that there was a problem and that he had paid his dues.[3] Although the Union argues that Feist's presentation of the dues receipt of another member shows "unclean hands," the judge made no finding that Feist attempted to deceive the Union; in any case, this conduct, considered in light of the record as a whole, does not satisfy the Union's burden here. See *Ralph's Grocery*, supra.

Finally, we find that the other cases upon which the judge relied in dismissing the 8(b)(1)(A) and 8(b)(2) allegations are distinguishable. See *Food & Commercial Workers Local 368A (Professional Services),* 317 NLRB 352, 354–355 (1995) (employee was aware of her dues obligations not only because of a prior suspension, but also because the union gave the employee multiple notifications about her dues delinquency that "substantially complied with the requirements" of *Philadelphia Sheraton*); *IBI Security*, 292 NLRB 648, 648–649 (1989) (employee "resisted joining the [u]nion and procrastinated until the [u]nion had no alternative but to seek his dismissal," despite the union notifying him of his obligations to join the union and pay an initiation fee, the amount of that fee, and the consequence of his failure to do so); *Big Rivers Electric Corp.*, 260 NLRB 329, 329 (1982) (employee failed to pay dues for 8 months after her hire and after repeated warnings from the union about the consequences of failing to pay dues). *Communications Workers Local 9509 (Pacific Bell)*, 295 NLRB 196, 196 (1989), is also inapposite because, there, the Board found that the union had provided the employee with adequate notice of her suspension.

For these reasons, we find that the Union did not provide Feist with adequate notice of his dues delinquency before informing the Employer that he was no longer eligible to work, and that the Union failed to demonstrate that Feist made a "conscious decision" to deliberately and willfully evade his dues obligations when he failed to pay his dues in February and March. Accordingly, we

[3] There is some evidence that Feist told Titzer on April 8 that he had chosen not to reinstate his membership. But Feist also told Titzer on that date that he had paid his dues and that there was a dispute. Therefore, we find that Feist's statements on April 8 do not demonstrate that he had made a conscious choice to deliberately and willfully evade his dues obligations. We do not make such a finding, however, concerning Feist's unequivocal statement to Titzer on May 28 that he had chosen not to reinstate his membership. This later statement, coupled with his failure to attempt to rectify his non-payment of dues in the intervening 7 weeks, arguably shows that at some point Feist made a conscious choice to deliberately and willfully evade his dues obligations. Nevertheless, Feist's conduct after the Union suspended him and informed the Employer does not excuse the Union's failure to provide him with adequate notice prior to suspending him.

reverse the judge and find that the Union violated Section 8(b)(1)(A) and 8(b)(2).

B. THE RESPONDENT EMPLOYER

1. 8(a)(3) and (1) violation

An employer violates Section 8(a)(3) and (1) "when it discharges an employee at the request of the union when it has 'reasonable grounds for believing' that the request was unlawful." *Valley Cabinet*, 253 NLRB at 99 (citing *Forsyth Hardwood Co.*, 243 NLRB 1039, 1040 (1979); *Conductron Corp.*, 183 NLRB at 427). "[W]hen placed on notice or given sufficient reason to suspect that the union may have failed to fulfill its fiduciary obligations, an employer has a duty to investigate the circumstances surrounding the request for discharge before honoring it." *Western Publishing*, 263 NLRB at 1113 (internal footnote omitted). The extent of this duty of inquiry will vary from case to case. *California Saw & Knife Works*, 320 NLRB 224, 246–247 (1995), enfd. sub nom. *Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), cert. denied 525 U.S. 813 (1998). In *California Saw*, the Board found that the employer satisfied its duty of inquiry, and, therefore, did not violate the Act because the employer gathered relevant facts and statements of position from the union and the employee before discharging the employee. Id. at 247. By contrast, in *Western Publishing*, 263 NLRB at 1113, the Board found that the employer violated the Act because it failed to investigate the facts surrounding the union's request before terminating the employee.

The judge found that the Employer did not violate Section 8(a)(3) and (1) by refusing to employ Feist pursuant to the Union's communication. Based on his finding that the Union lawfully suspended Feist's membership, he reasoned that the contract's union-security clause prevented the Employer from recalling Feist. The judge further found that, even if the Union had acted unlawfully, the Employer did not have reasonable grounds for believing that the Union suspended Feist for reasons other than his failure to pay dues (or that he was denied membership on terms and conditions not generally applicable to other members). Although the judge recognized that "[o]ne could argue that Skanska still had an obligation to call the Union with regard to Feist's claim that [the] Union was in the process of investigating his contention," he concluded that a call to the Union "would have only led the employer herein to believe that the Union had a bona fide belief that Feist had not paid his dues as required."

Because we disagree with the judge's conclusion that the Employer lacked reasonable grounds for believing that the Union's request was unlawful, we find that the Employer's change of Feist's status to "suspended" violated 8(a)(3) and (1). In *Claremont Resort Hotel and Tennis Club*, 260 NLRB 1088, 1092, 1094 (1982), the Board found that the employer had reasonable grounds for believing that the union's request was unlawful when the employee, upon being told that he was being discharged for nonpayment of dues, told his employer that he had cleared the matter with the union and had paid his dues. In the instant case, Feist told Titzer that there was a dispute involving his dues and claimed that he had, in fact, paid them. Feist, like the employee in *Claremont Resort Hotel*, "did all that he could to put the Employer on notice that something was amiss." 260 NLRB at 1094. Thereafter, the Employer had a duty to make further inquiry of the Union before changing his employment status.[4]

Furthermore, the judge erred by reasoning that a call from the Employer to the Union here would only have served to confirm that the Union's request was lawful. The Board has already rejected such reasoning as "idle speculation." See *Claremont*, 260 NLRB at 1094.

We find that, presented with Feist's protestations that he had, in fact, paid his dues, the Employer had an affirmative duty to investigate further before changing his employment status. Because it failed to fulfill this duty, we find that the Employer violated 8(a)(3) and (1).[5]

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[4] We note that this case is distinguishable from cases in which the Board has found that the employers had no reasonable grounds for believing the unions' requests were unlawful because the employees did not dispute the unions' claims that they had not paid their dues and did nothing to protest their discharges. See, e.g., *Monson Trucking, Inc.,* 324 NLRB 933, 935–936 (1997), enfd. 204 F.3d 822 (8th Cir. 2000); *Western Publishing*, 263 NLRB at 1113; *Valley Cabinet*, 253 NLRB at 98; *Allied Maintenance Co.,* 196 NLRB 566, 571 fn. 17 (1972); *Associated Transport, Inc*., 169 NLRB 1143, 1143 (1968), enfd. sub nom. *NLRB v. Teamsters Local 182*, 401 F.2d 509 (2d Cir. 1968), cert. denied 394 U.S. 213 (1969).

[5] We find that Titzer is the Employer's agent because she had actual authority to change Feist's employment status, and we find that placing Feist on suspended status was tantamount to a discharge because this change in his employment status prevented him from receiving job assignments.

Member Johnson notes that, in his view, it is a close issue whether the Employer violated Sec. 8(a)(3) in light of Feist's testimony—not addressed by the judge— that, after Titzer "suggested that [he] be placed on unavailable status," Feist "agreed that might be the best thing to do at that time." (Tr. 116.) However, Member Johnson ultimately agrees with his colleagues that the Employer violated the Act because Feist did not withdraw his statements to Titzer that there was a dispute involving his dues and that he had paid them. Member Johnson would not find a violation if an employee withdraws his statements regarding a dues dispute by, for example, telling the employer that the employee does not want to advance the issue or that the union is probably right that the employee is delinquent.

2. Independent 8(a)(1) violation

The General Counsel has excepted to the judge's failure to address the complaint allegation that the Employer independently violated Section 8(a)(1) by informing Feist (twice) that it was refusing to employ him based on the Union's communication. We find that the Employer violated Section 8(a)(1) when Titzer informed Feist on April 8 that she was changing his status from available for hire to suspended. As discussed above, the Union violated the Act by suspending Feist's membership and informing the Employer that he was ineligible for work because the Union failed to provide Feist with adequate notice of his dues delinquency so as to allow him to cure the delinquency. The Employer violated the Act by discharging Feist at the Union's request because it failed to investigate when it had reasonable grounds for believing that the request was unlawful. By informing Feist on April 8 that it was suspending him based on the Union's representation that Feist had not paid his dues—a representation that Feist protested—the Employer effectively sent a message of futility to Feist and chilled his right to dispute the Union's calculations (which he had never seen, as the Union had not provided a proper *Philadelphia Sheraton* notice). This, in turn, left Feist with no choice but to pay the disputed amount or face unemployment. In these circumstances, we find that the Employer's statement independently violated Section 8(a)(1).[6] See generally *Marion Memorial Hospital*, 335 NLRB 1016, 1019 (2001), enfd. 321 F.3d 1178 (D.C. Cir. 2003) (finding that an employer independently violated Section 8(a)(1) by announcing changes to employees' terms and conditions of employment that were unilaterally and unlawfully implemented in violation of Section 8(a)(5)).

CONCLUSIONS OF LAW

1. Industrial Contractors Skanska is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Laborers International Union of North America, Local Union No. 561, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union has violated Section 8(b)(1)(A) and 8(b)(2) of the Act by attempting to cause and causing the Respondent Employer to discharge Michael Feist for nonpayment of dues and reinstatement fees by informing the Employer that Feist was ineligible for work or recall due to his failure to maintain Union membership, without satisfying its fiduciary duty to Feist.

4. The Employer has violated Section 8(a)(3) and (1) of the Act by refusing to employ Michael Feist without investigating and/or ascertaining the circumstances underlying the Union's request to discharge him, in the face of reasonable cause to believe such investigation was warranted.

5. The Employer has violated Section 8(a)(1) of the Act by informing Michael Feist on April 8 that it was changing his status from available for hire to suspended pursuant to the Union's request.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Union has violated Section 8(b)(1)(A) and (2) and that the Employer has violated Section 8(a)(3) and (1) of the Act, we shall order that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Specifically, we shall order that the Union, within 14 days from the date of the Board's Order, notify the Employer and Michael Feist, in writing, that the Union rescinds its request for Feist's discharge, and that the Union has no objection to his reinstatement without any loss of seniority or other rights and privileges previously enjoyed by him. We shall order that the Employer offer Feist full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.[7] Additionally, we shall order that the Union, jointly and severally with the Employer, make Feist whole for any loss of earnings suffered by reason of the discrimination against him, less interim earnings, from the date of his discharge until 5 days following the Union's request for his reinstatement.[8] The

[6] Given our finding regarding the Employer's April statement, we find it unnecessary to pass on whether the Employer also violated the Act in May when Titzer informed Feist that he could not work for Skanska unless he was a union member in good standing.

Member Johnson generally agrees that "[m]erely advising employees of the reason for their discharge is 'part of the res gestae of the unlawful termination, and is subsumed by that violation.'" *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 9 fn. 2 (2014) (Member Miscimarra dissenting in part, citing former Chairman Hurtgen's partial dissent in *Benesight, Inc.*, 337 NLRB 282, 285 (2001)). Here, however, Titzer's April 8 statement was more than part and parcel of explaining Feist's discharge; she independently suggested—after Feist protested his dues delinquency—that he be placed on "suspended" status.

[7] As noted in the facts, because Feist was already laid off when the Union informed the Employer that he was ineligible for work, Titzer changed his employment status from "available" to "suspended." We leave to compliance whether Feist would have been recalled or offered substantially equivalent employment absent the Union's request.

[8] In the compliance proceeding, the Respondents may argue that backpay should be cut off on May 28, 2014, or a different date, due to

Employer shall be solely liable for any loss of wages and other benefits incurred by Feist after that date.[9] Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Further, we shall order that the Union, jointly and severally with the Employer, compensate Feist for the adverse tax consequences, if any, of receiving a lump-sum backpay award and that the Employer file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). The Union and the Employer shall also be required to expunge from their files and records any and all references to the unlawful discharge, and to notify Feist in writing that this has been done and that the discharge will not be used against him in any way.

ORDER

The National Labor Relations Board orders that:

A. The Respondent Union, Laborers International Union of North America, Local Union No. 561, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Causing or attempting to cause Industrial Contractors Skanska (the Employer) to discharge or otherwise discriminate against employees for failure to tender to the Union periodic dues, without first providing the employee notice of the amount owed, the period for which dues are owed, and the method by which the amount owed was computed, and without providing the employee with a reasonable opportunity to pay the amount owed.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reinstate Michael Feist to the rolls of the Union in good standing, contingent upon payment of union dues owed.

(b) Within 14 days from the date of this Order, notify the Employer and Michael Feist, in writing, that it rescinds its request for Feist's discharge, and it has no objection to his reinstatement without any loss of seniority or other rights and privileges previously enjoyed by him.

(c) Jointly and severally with the Employer, make Feist whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(d) Jointly and severally with the Employer, compensate Feist for the adverse tax consequences, if any, of receiving a lump-sum backpay award.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter, notify Feist in writing that this has been done and that the discharge will not be used against him in any way.

(f) Within 14 days after service by the Region, post at its Evansville, Indiana facility, copies of the attached notice marked "Appendix A."[10] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Union's authorized representative, shall be posted by the Union and maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Union customarily communicates with its members by such means. Reasonable steps shall be taken by the Union to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Within 14 days after service by the Region, deliver to the Regional Director for Region 25, signed copies of the notice in sufficient number for posting by the Employer at its Evansville, Indiana facility, if it wishes, in all places where notices to employees are customarily posted.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 25 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Union has taken to comply.

B. The Respondent Employer, Industrial Contractors Skanska, Evansville, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Encouraging or discouraging membership in Local Union No. 561 by discharging or otherwise discriminating against employees in response to a union demand

Feist's eventual conscious decision, subsequent to his initial suspension, to willingly and deliberately evade his dues obligation.

[9] See *Claremont Resort Hotel*, 260 NLRB at 1088 fn. 2; *GreenTeam of San Jose*, 320 NLRB 999, 1007 (1996).

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

where the Employer has reasonable grounds for believing that the demand is unlawful.

(b) Informing employees, after they have disputed their dues delinquency and without investigating, that they will be ineligible for work.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Michael Feist full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Jointly and severally with the Union, make Feist whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Jointly and severally with the Union, compensate Feist for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter, notify Feist in writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Evansville, Indiana facility, copies of the attached notice marked "Appendix B."[11] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Employer's authorized representative, shall be posted by the Employer and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Employer customarily communicates with its employees by such means. Reasonable steps shall be taken by the Employer to ensure that the notices are not altered, defaced, or covered by any other material. If the Employer has gone out of business or closed the facility involved in these proceedings, the Employer shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Employer at any time since April 8, 2014.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 25 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Employer has taken to comply.

Dated, Washington, D.C. August 20, 2015

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A
NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT cause or attempt to cause Industrial Contractors Skanska (the Employer) to discharge or otherwise discriminate against you for failure to tender to us periodic dues, without first providing you notice of the amount owed, the period for which dues are owed, and the method by which the amount owed was computed, and without providing you with a reasonable opportunity to pay the amount owed.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above.

WE WILL reinstate Michael Feist to the rolls of the Union in good standing, contingent upon payment of union dues owed.

WE WILL, within 14 days from the date of the Board's Order, notify the Employer and Michael Feist, in writing, that we rescind our request for Feist's discharge, and that we have no objection to his reinstatement without any loss of seniority or other rights and privileges previously enjoyed by him.

WE WILL, jointly and severally with the Employer, make Feist whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, jointly and severally with the Employer, compensate Feist for the adverse tax consequences, if any, of receiving a lump-sum backpay award.

WE WILL, within 14 days from the date of the Board's Order, remove from our files, any reference to the unlawful discharge of Feist, and WE WILL, within 3 days thereafter, notify him in writing that we have done so and that we will not use the discharge against him in any way.

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION NO. 561

The Board's decision can be found at www.nlrb.gov/case/25-CA-130127 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX B
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT encourage or discourage your membership in Laborers International Union of North America, Local Union No. 561 (the Union), by discharging or otherwise discriminating against you in response to a union demand where we have reasonable grounds for believing that the demand is unlawful.

WE WILL NOT inform you, after you have disputed a dues delinquency and without investigating, that you will be ineligible for work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Michael Feist full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL, jointly and severally with the Union, make Michael Feist whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, jointly and severally with the Union, compensate Feist for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Feist, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

INDUSTRIAL CONTRACTORS SKANSKA

The Board's decision can be found at www.nlrb.gov/case/25-CA-130127 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Derek A. Johnson, Esq., for the General Counsel.
Charles L. Berger and *Jennifer Ulrich-Keppler, Esqs. (Berger and Berger, LLP),* of Evansville, Indiana, for Respondent Laborers Local No. 561.
Sara B. Kalis, Esq. (Littler Mendelson, P.C.), of Minneapolis, Minnesota, for Respondent Industrial Contractors Skanska.
John Scully and *Byron Andrus, Esqs. (The National Right to Work Legal Defense Foundation),* of Springfield, Virginia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Henderson, Kentucky, on January 6, 2015. Michael Feist filed the charges in this case on June 5, 2014. The General Counsel issued the complaint on September 30, 2014.

The General Counsel alleges that Respondent Union, Laborer's Local 561, violated Section 8(b)(1)(A) and 8(b)(2) of the Act in notifying Respondent Industrial Contractors Skanska

(Skanska) that Michael Feist was no longer a union member in good standing and therefore was not eligible for hire by Skanska. More specifically the General Counsel alleges that the Union did not give Feist adequate notice of the amount of dues he owed, a deadline by which it must be paid, notice that he would be denied employment or giving Feist a reasonable time to pay.

The General Counsel alleges that Skanska violated Section 8(a)(3) and (1) in refusing to employ Feist pursuant to its communication from the Union.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent Union, Respondent Employer, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Industrial Contractors Skanska (Skanska) is a large construction contractor which does business in the Evansville, Indiana area, amongst others. In 2013, Skanska performed services worth more than $50,000 outside of the State of Indiana. Skanska admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Michael Feist has been a member of Laborers' Local No. 561 since 1997. Since 1998 he has worked regularly, but not continuously, for Respondent Skanska. Skanska recalls Feist for work whenever it has work corresponding to his skills. He has also worked for other employers, but rarely uses the union hiring hall. Local 561 members are allowed to solicit work without going through the hiring hall. They also have recall rights with former employers with whom they have worked in the prior 12 months.

Skanska laid Feist off of work at the end of March 2014. However, he was on a list of available employees who would be called whenever Skanska had a need for his services. On April 8, Feist went to the Local 561 union hall. There was a union membership meeting that evening and Feist went to pay his dues so that he could attend.

When Feist attempted to pay, Diane McCormick, the Union's receptionist/secretary, informed Feist that his membership had been suspended and that she could not accept his dues payment. In such circumstances, a union member must pay all outstanding dues and a reinstatement fee. Feist was aware of this because his membership had been suspended on 4 previous occasions. On each of those occasions, Feist was informed of his suspension verbally. On each of these occasions, except the one in 2013, Feist claimed that the Union's records of his dues payments were incorrect. However, on these three occasions, he then paid his current and back monthly union dues and a fine/reimbursement fee for each month that he owed dues in order to restore his membership in good standing. Feist paid his outstanding union dues and reinstatement fees as follows:

> December 15, 2004: Feist paid $60 in union dues and a $192 reinstatement fee.
> September 13, 2007: Feist paid $75 in dues and a $112 reinstatement fee.
> May 14, 2012: Feist paid $75 in dues and a $336 reinstatement fee.
> March 1, 2013: Feist paid $75 in dues and a $112 reinstatement fee.

After talking to McCormick on April 8, 2014, Feist had a conversation with Barry Russell, the business manager and president of Local 561.

Feist told Russell that he had paid his dues. Russell asked Feist to show him a receipt. Then Feist left the union hall and returned with a receipt for union dues for the month of March 2014. However, the name on the receipt was that of Brian Simpson, another Local 561 member; not Feist's. When Russell pointed this out to Feist, the latter said he would have to talk to Brian Simpson. There is no credible evidence in this record indicating that Feist paid his $25 monthly union dues for

[1] Tr. 157, lines 16 and 20 should read *Beck* (referring to *Communications Workers v. Beck,* 487 U.S. 735 (1988)), rather than back.

the months of February and March 2014.[2] I find that he did not do so. The Union automatically suspends the membership of any member who is more that 2 months and 1 day in arrears of his or her monthly dues.[3]

At 3:40 p.m. on April 8, 2014, the Union faxed Skanska notification that Michael Feist would not be eligible for work or recall due to his failure to maintain his membership in the Union.

In March 2014, the Union did not notify Feist that he was 2 months in arrears because it did not believe it had his current address. On one occasion prior to March 2014 Diane McCormick asked Feist for his address. He replied that the union pension fund had his mailing address, so there was no need for him to give it to Local 561. The Union is not entitled to such information from the pension fund.[4]

Upon receiving notification from the Union, Skanska dispatcher Cinda "Susie" Titzer called Feist on April 8. She informed him that Skanska was changing his status from available for hire to suspended.[5] Feist told Titzer that he was aware that the Union had suspended his membership and that he was seeking legal counsel. Feist also informed Titzer that he had a dispute with the Union involving his dues (Tr. 116). I credit Titzer's testimony that Feist specifically claimed to have paid his dues (Tr. 91–92). Further, he told Titzer that he was not going to reinstate his union membership in good standing.

On May 28, 2014, Titzer called Feist again. She asked him about his membership status. Feist told her it was unchanged and that he chose not to reinstate his membership. Titzer informed Feist that he could not work for Skanska unless he was a union member in good standing. Article IV of the collective-bargaining agreement to which Local 561 and Skanska are parties prohibits Skanska from employing a Local 561 member who has been suspended and not reinstated for nonpayment of dues (GC Exh. 2, pp. 9–10).[6]

In June 2014, Titzer offered Feist a job on behalf of Skanska at an Alcoa plant and then withdrew the offer the next day.

Analysis

The General Counsel relies mainly on the Board's decision in *Philadelphia Sheraton Corp.,* 136 NLRB 888, 896–897 (1962), enfd. 320 F. 2d 254 (3d Cir. 1963). In that case the Board found the Union violated Section 8(b)(1)(A) by demanding that the employer discharge two employees for failing to pay their dues. The Board so found because the Union in that case never satisfactorily notified the employees what their membership obligations were. Neither employee was told the amount of his dues or when payment was to be made. The Board found that under these circumstances it was grossly inequitable and contrary to the spirit of the Act to permit the Union to request the discharge of these employees.

However, the Board has also dismissed Section 8(b)(1)(A) allegations in this regard in situations in which the employee/member had actual knowledge of his or her dues obligations (amount, due date, etc., means of reinstating membership). In *Food & Commercial Workers Local 368A (Professional Services),* 317 NLRB 352, 354–355 (1995), the Board dismissed the complaint because the delinquent employee, like Michael Feist in the instant case, had actual knowledge of the amount of dues owed, the date by which it had to be paid, the consequences of nonpayment and the means of reinstating her membership. Also like Feist, the employee in the *Food & Commercial Workers* case was aware of her dues obligations from suspensions of her membership prior to the one precipitating the suspension and discharge that give rise to the 1995 case. The Board has reached similar conclusions in *Local No. 60 Teamsters (Ralph's Grocery)* 209 NLRB 117, 124–125 (1974); *Big Rivers Electric Corp.,* 260 NLRB 329 (1982); *IBI Security,* 292 NLRB 648 (1989); and *Communications Workers Local 9509 (Pacific Bell)* 295 NLRB 196, 200 (1989).[7]

Michael Feist never claimed to be unaware of his dues obligation. In fact, from his past experience, he obviously was aware of the amount of dues owed and what he needed to pay to reinstate his membership. To the Union, he asserted he paid his March dues. He never claimed to have paid his monthly union dues for February to the Union—at least until the day of

[2] While Feist maintains that he was not 2 months and 1 day in arrears, there is no credible evidence to support this claim. The only claim he ever made to the Union for this contention was presenting a receipt with Brian Simpson's name on it. At Tr. 103 Feist testified that he remembers making a payment in March 2014. I find that he did not do so. He kept receipts for the dues he paid, but does not have a receipt for a payment in March (Tr. 104). Feist did not testify that he went to the union hall to pay his dues between January 10, 2014, when his paid his dues for January, and April 8, 2014, or give any other details as to why he thinks he paid his March dues.

At trial, Feist testified that his union membership card indicates that he had paid his dues through February 2014. Since he never made this claim prior to the trial, I do not credit this testimony. Moreover, Feist knew that the receipts he received from the Union indicated that he was paid up only to the end of January 2014. He never raised the discrepancy between his receipts and his membership card with the Union. Moreover, I credit the testimony of the Union's secretary, Diane McCormick, that the placement of stamps on a membership card does not establish the payment status of a Local 561 member.

[3] Members who are working are also assessed working dues that are deducted from their pay by their employer.

[4] The receipts that the Union gave to Feist upon payment of his dues from March 2013 to January 2014 do not have a street address. However, they indicate that the Union believed he lived in zip code 47714 (which happens to be the same zip code as the one on Brian Simpson's dues receipt). This is different than the zip code of the address at which Feist testified he receives his mail, 47720 (GC Exhs. 6 and 8). The pension fund sent mail to Feist at the 47720 address as late as October 2013. While Feist indicated at trial that he lived at the 47720 address until June 2014; he never told that to the Union. I do not read his testimony at Tr. 123–124 for the proposition that Feist gave his mailing address to the Union. The testimony stands for the proposition that he gave his address to the Health and Welfare Fund on 2 occasions.

[5] Skanska receives 10–12 suspension notices a year from Local 561.

[6] There is no evidence or allegation in this case that the union security clause violates Indiana's right-to-work law. According to Skanska's brief at fn. 5 on p. 14, the Indiana right-to-work statute does not apply to contracts in effect on or prior to March 14, 2012. The collective-bargaining agreement between the Union and Skanska became effective on March 12, 2012.

[7] *Valley Cabinet & Mfg. Co.,* 253 NLRB 98 (1980), which is relied on by the General Counsel and the Charging Party, strikes me as incompatible with this line of cases. However, I conclude that the weight of Board precedent is consistent with the above cited cases.

the instant trial. Even at trial, Feist did not claim that he was unaware of any facet of his dues obligation; he claimed he had paid for months for which the Union records showed that he did not pay.

While the Union may not had advised Feist of the employment consequences of his suspended status, Susan Titzer of Skanska did so on April 8 and in May. Thus, Feist made a conscious decision not to make the payments necessary to reinstate his status as a union member in good standing.

Feist testified that he expected to have union secretary-treasurer Harlin Scott investigate whether or not he had paid his March dues and report back to him. Assuming this to be so, Feist made no attempt to follow up with Scott or anybody else at the Union. There is nothing in this record to indicate that Feist had a good-faith belief that he had paid his dues. Indeed, he appears to have claimed to have paid his dues on three other occasions when he had no evidence to support this contention. Given his claims in 2004, 2007, and 2012 that he was being suspended for dues he had already paid, one would expect Feist to have been very careful about keeping his receipts. The fact that Feist did not have a receipt for his February and March 2014 dues leads me to conclude that he did not pay his monthly dues for these months.

Thus, I conclude Feist was well aware that he had not paid his monthly dues for over 2 months and that the Union was privileged to suspend his membership as a result. Therefore, Skanska could not recall Feist to work pursuant to the union security clause of the parties' collective-bargaining agreement. I therefore dismiss the complaint against both Respondents.

In sum, I find that the Union's failure to notify Michael Feist of his dues obligations prior to suspending his membership did not violate Section 8(b)(1)(A) or 8(b)(2) because Feist had actual knowledge of those obligations. Consequently, I also find that Skanska did not violate the Act in refusing to employ Michael Feist.

Moreover, I would dismiss the complaint against Skanska even if I were to have found that the Union violated the Act. By the terms of Section 8(a)(3), Skanska would be in violation of Section 8(a)(3) only if it had reasonable grounds for believing that the Union denied membership to Michael Feist on terms and conditions that were not generally applicable to other members, or that his membership was suspended for reasons other than failure to pay his monthly dues.

The Union's April 8, 2014 fax to Skanska did not specify that it was Feist's failure to pay his monthly dues that was the reason he failed to maintain his membership in the Union. However, when Titzer called Feist the same day, he informed her that he had a dispute with the Union involving his dues.

The Board has found an employer to be in violation of Section 8(a)(3) in circumstances in which it discharged an employee despite actual knowledge that the employee had satisfied his or her dues obligations, e.g. *Planned Building Services,* 318 NLRB 1049, 1063 (1995). It has also found an employer in violation of Section 8(a)(3) where the employee told the employer that the Union agreed that the employee had satisfied his or her dues obligations, but the Employer discharged the employee without checking with the Union to determine whether this was so, *H. C. Macaulay Foundry Co.,* 223 NLRB 815, 818 (1976); *Conductron Corp.,* 183 NLRB 419, 427–428 (1970).

In contrast, Feist did not tell Titzer that the Union now accepted his claim that he was not 2 months in arrears. One could argue that the Skanska still had an obligation to call the Union with regard to Feist's claim that Union Secretary-Treasurer Scott was in the process of investigating his contention. However, I would find a violation on the part of Skanska in these circumstances only if a call to the Union would have given Skanska reason to believe that Feist's membership had been suspended due to reasons other than failure to pay his monthly dues. To the contrary, such a call would have only led the employer herein to believe that the Union had a bona fide belief that Feist had not paid his dues as required. Thus, I conclude that Skanska did not violate the Act even assuming that the Union did so.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. February 20, 2015

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.